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# In the Supreme Court of the United States

OCTOBER TERM, 1969

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**DONALD SIMON,**

*Petitioner,*

vs.

**UNITED STATES OF AMERICA,**

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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To: *The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States.*

Your Petitioner, Donald Simon, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming his judgment of conviction for assault upon federal officers in violation of Title 18, United States Code, Section 111.

## OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It is printed in the Appendix to this Petition. (App. 2)

## JURISDICTION

Judgment of the Court of Appeals was entered on April 15, 1969. (App. 7) A timely Petition for Rehearing was denied on May 14, 1969. (App. 8) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED FOR REVIEW

1. In a prosecution for assault upon a federal officer, which assault occurred incident to a warrantless arrest, is proof of reasonable cause for the arrest necessary to conviction, or does the mere fact that the officers were attempting to effect an arrest satisfy the provision of the statute that the assault occurred "while such officers were engaged in the performance of their official duties." (Title 18, U.S.C. §111)

2. Has the former right to resist an arrest, where there exists no reasonable cause therefor, been diminished to the extinction of this Court's prior decisions?

3. If reasonable cause is necessary to conviction of an assault upon a federal officer attempting to effect a warrantless arrest, can a complaint filed after the arrest, and no part of the trial record, supply reasonable cause in and of itself, or is the knowledge upon which the officers acted a matter of primary testimonial evidence at trial, subject to cross-examination and impeachment?

## STATUTE AND RULE INVOLVED

### Title 18, United States Code, Section 111

§ 111. Assaulting, resisting, or impeding certain officers or employees

"Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

"Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

June 25, 1948, c. 645, 62 Stat. 688."

### Title 18, United States Code Rule 5(a)

"Rule 5. Proceedings before the Commissioner

"(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

## STATEMENT OF THE CASE

The petitioner was convicted on all counts of a three count indictment returned March 30, 1967, which indictment charged this petitioner did, on March 27, 1967, wilfully and with force, assault, resist, oppose, impede, and interfere with three officers of the Federal Bureau of Narcotics, knowing them to be such officers, and while such officers were engaged in the performance of their official duties, in violation of Title 18, U.S.C., Section 111. (A. 5-6)

The evidence upon which conviction was had, viewed in the light most favorable to the Government, is accurately set forth in the third paragraph of the opinion of the United States Court of Appeals for the Seventh Circuit. (App. 2) However, a fuller exposition of the evidence seems appropriate.

David Haight, a Special Agent of the Bureau of Narcotics, Treasury Department, testified that on March 27, 1967, he received a call from one who identified himself as Davenport of the Madison, Wisconsin Police Department. He testified that the caller, who represented himself as a Lieutenant-Detective related to him, Haight, "certain information about the marijuana activities of a Donald Simon and Jack Friedman. He further stated to me that Friedman was in cooperation with the Madison, Wisconsin Police Department and he named, as one of his sources of supply for marijuana, Donald Simon." (Tr. 20) According to Haight, the person calling himself Detective Davenport mentioned that he had received information from *others* concerning a possible violation of the marijuana laws by the petitioner. (Tr. 26-27) Haight

had not theretofore known any Lieutenant Detective Davenport, and knew only that the call was initiated by one who identified himself as such. Haight had, in fact, never had communications with anyone in the Madison Police Department, (A. 28) nor were the names Friedman or Simon familiar to Haight, and he had never had any dealings with persons who according to the person who identified himself as Davenport gave information to the Wisconsin Police Department. (A. 28)

After the communication from this Lieutenant Detective Davenport, Haight conferred with his immediate superior, Arthur Lewis, and with Assistant United States Attorney Richard Shultz [Northern District of Illinois] and was directed to arrest Simon (A. 27). These conversations may have been by two-way radio. (A. 24)

After these conversations, Haight, together with Narcotics Agents Rendina and Hughes, proceeded to 6016 North St. Louis in Chicago. (A. 24) They had no arrest warrant. (A. 27, 34)

Haight looked through the window of the private residence there and observed the petitioner talking on the telephone in the kitchen at the rear of the house. Then he and Agent Hughes went to the front door while Agent Rendina went around to the rear. (A. 24)

Agent Hughes opened the screen door and rang the front doorbell. When petitioner came to and opened the door, Hughes said "We are Federal Narcotics Agents. Are you Donald Simon?" Defendant answered "Yes." Agent Hughes said "You are under arrest for conspiracy to violate the federal marijuana laws," or violation of the federal marijuana laws. The petitioner said "I am not going anywhere with you." (A. 24, 28, 37) Then he struck Hughes in the mouth. (A. 25)

Then, petitioner fled into the living room knocking furniture about, and Hughes and Haight pursued him and a struggle ensued, and in attempting to handcuff him, struggled falling, all three of them, to the floor. Eventually on the floor the two agents got Simon's hands handcuffed before him, during all of which time petitioner was flailing his arms and kicking. During this time, according to Haight, he and Hughes were kicked numerous times. (A. 25)

After getting petitioner cuffed, Haight went to the back of the house and admitted Rendina. (A. 25)

As Rendina and Haight were entering the living room, Hughes was seating petitioner in a chair. Hughes again said "We are Federal Agents, and we are arresting you for violation of the Federal Marijuana Laws." (A. 25)

While Hughes was standing in front of the chair in which he had seated petitioner, he asked the petitioner if he had any marijuana in the house and the petitioner answered, "No." (A. 31, 40) Then petitioner attempted to get up and, in doing so, kicked out and caught Hughes on the back of his left hand. Rendina grabbed the petitioner from behind with one arm about his waist and one arm and hand about his chin and neck area, and the petitioner bit Rendina's thumb, breaking the skin. (A. 34, 35) The three agents then wrestled him back to the floor, during which Hughes and Haight were kicked. (A. 25-26) The agents then drew a belt through the handcuffs and fastened the belt at Simon's back. They then obtained his coat and left the residence proceeding to the car. Near the car, an incident occurred with the petitioner's father, and Haight, who testified he was holding petitioner from the back in a bear hug, also testified that petitioner came back with his foot and kicked Haight in the right leg between the ankle and knee. (A. 32)

They then took petitioner to Swedish Covenant Hospital where petitioner was checked. The agents then turned him over to the Chicago Police Department for detention until the following day, and the three agents betook themselves to St. Lukes-Presbyterian Hospital for complete check-ups. (A. 32-33) Apparently the sole injury was an abrasion to Hughes' lower lip. (A. 41)

Of this evidence the United States Court of Appeals for the Seventh Circuit said:

> "As an additional ground for sustaining Simon's conviction, the government argues that even if the arrest was unlawful, Simon had no right to resist the arrest as he did. We think this argument has merit, and that the consequences of accepting defendant's argument to the contrary would lead to great mischief with respect to encouraging resistance to, and to endangering, arresting officers. We recognize that law enforcement officers are frequently called on to make arrests without warrants and should not be held, so far as their personal security is concerned, to a nicety of distinctions between probable cause and lack of probable cause in differing situations of warrantless arrests. It is for this reason we believe that the force of *John Bad Elk* has been diminished. See *United States* v. *Heliczer*, 373 F.2d 241, 246 n. 3 (2d Cir. 1967). In the case before us the FBN officers, at the door of Simon's home, identified themselves so that Simon was aware who they were. And the agents did not lose this official capacity, even if the arrest were subsequently adjudged to be unlawful. *Id.* at 245." (Op. 16766, p. 5)

**The Post-Arrest Complaint**

The information that purportedly went to probable cause in the complaint for arrest was, for the most part, never repeated on the stand and never subjected to cross-ex-

amination, nor was the petitioner ever confronted with it. Haight testified merely as aforesaid, that he received "information about marijuana activities" of a Donald Simon. (A. 27) The matters he set forth in the complaint, which he filed the day following the arrest, were never testified to by him. An effort was made to introduce the complaint through Narcotics Agent Hughes, but admission into evidence was denied, because the Court found that Hughes knew only what Agent Haight had told him. (A. 39-40)

The Court of Appeals for the Seventh Circuit ruled:

> "We agree that the probable cause issue must be determined upon the knowledge possessed by the agents at the time of arrest and not upon evidence developed at the trial, following the pre-trial hearing on the motion to quash." (App. 2)

It then proceeded on the basis of the post-arrest affidavit filed by Haight—which was no part of the evidence on trial—and found it sufficient. (See Paragraphs 5 through 9 of the Opinion of the United States Court of Appeals for the Seventh Circuit. (App. 3-6))

## REASONS FOR GRANTING THE WRIT

I This Court should grant Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit because that decision stands for the proposition that the mere fact that the persons assaulted were agents and employees of the Federal Bureau of Narcotics is sufficient to satisfy the statutory requirement that they were "officers . . . engaged in the performance of their official duties." That decision is in conflict with this Court's decisions in *John Brown* v. *United States,* 159 U.S. 100; *John Bad Elk* v. *United States,* 177 U.S. 529; and *United States* v. *Di Re,* 332 U.S. 581. This decision, together with *United States* v. *Heliczer,* 2 Cir., 373 F. 2d 241 is in direct conflict with the Fifth Circuit decision in *Brown* v. *United States,* 47 F. 2d 681 and the Ninth Circuit decision in *Briggs* v. *United States,* 24 F. 2d 961.

II This Court should issue its Writ of Certiorari to the Seventh Circuit to review this decision which, together with the Second Circuit decision in *United States* v. *Heliczer,* 373 F. 2d 241 states blandly, without any apparent authority from this Court, that this Court's rulings relative to a right to resist unlawful arrest established in *Brown* v. *United States,* 159 U.S. 100, *John Bad Elk* v. *United States,* 177 U.S. 529, and *United States* v. *Di Re,* 332 U.S. 581, have been reduced in importance because of growing tendencies in state courts to abrogate that right.

III If reasonable cause for arrest is necessary to conviction of an assault upon a federal officer, then the guarantees of the Sixth Amendment to the right of cross-examination and to confrontation apply as to any other essential

element. This Court should issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit because that Court seems confused between the proper evaluation of a complaint for the issuance of a warrant, which is restricted to the four corners of the affidavit upon which it issues, and proof of an essential element, dependent upon evidence developed at trial.

## I.

The United States Court of Appeals for the Seventh Circuit has ruled as follows:

> "In the case before us the FBN officers, at the door of Simon's home, identified themselves so that Simon was aware who they were. And the agents did not lose this official capacity, even if the arrest were subsequently adjudged to be unlawful. . . . ." (Op. 16776, page 5.

In other words, the statutory requirement that the officers assaulted be "officers . . . engaged in the performance of official duties" is satisfied by the mere fact that they are employees of the Bureau of Narcotics. That decision directly conflicts with this Court's decision in *John Brown* v. *United States*, 159 U.S. 100. In that case, two deputized peace officers were aware of outstanding warrants against one Kraig. They mistook Brown for Kraig and attempted his arrest and in such attempt were shot and killed by Brown. This Court made it clear that the inquiry appropriate to the consideration of the jury as to the extent of the aggravation was to be measured the same as if they were private citizens, they having no warrant, nor was there any warrant outstanding for Brown. In this Court's decision in *John Bad Elk* v. *United States*, 177 U.S. 529, an attempt was made by policemen to effect

the arrest of John Bad Elk, even though there was no evidence of a complaint having been made before any magistrate or officer charging an offense against him, nor was there any proof that he had been guilty of any criminal offense or that he had violated any rule or regulation of the government, or that any warrant had issued for his arrest. This Court overturned the conviction because the jury was charged that the policemen had the right to use all necessary force to arrest, when in fact, they had no right to arrest.

Strangely, in *United States* v. *DiRe,* 332 U.S. 581, the prosecution not only gave heed to the right to resist an unlawful arrest, but argued that the fact that he did not resist or protest the unlawful arrest was a factor from which probable cause for his arrest could be deduced. In *Briggs* v. *United States,* 24 F. 2d 961, the Ninth Circuit found the prohibitions officers' mere position insufficient to justify the arrest nor to render Briggs liable for resisting the arrest by the agents.

In *Brown* v. *United States,* 47 F. 2d 681, the Fifth Circuit stated the point clearly:

> "The federal offense of resisting an officer in the execution of his duty is not made out if the officer was in fact not executing his duty but committing a trespass of unlawful arrest." (47 F. 2d at 682, concurring opinion).

All of these cases directly conflict with the opinion of the Seventh Circuit quoted above, which makes the fact of federal employment sufficient for conviction under Section 111. *United States* v. *Heliczer,* 2 Cir., 373 F. 2d 241, was critical of restraining official duty "with the boundaries within which an arrest could lawfully be made."

Both this opinion of the United States Court of Appeals for the Seventh Circuit and *Heliczer* directly conflict with this Court's opinions above stated and with the extant opinions, unrepudiated, of the Fifth and Ninth Circuits. Certiorari should be granted on both grounds.

## II.

Though clearly recognizing that *John Bad Elk* v. *United States*, 177 U.S. 529, and *United States* v. *DiRe*, 332 U.S. 581 hold there is a right to resist an unlawful arrest, the Second Circuit in *Heliczer* stated:

> "There is growing authority that its [John Bad Elk] vitality is waning." (373 F.2d at 346, fn. 3)

That decision then proceeds to justify the waning of this Court's opinions by reference to state statutes nullifying the teaching of those opinions, and adopts the position that the state courts' persuasions may overrule what this court has stated to be the law. The Court of Appeals for the Seventh Circuit likewise refused to confine federal officers "to a nicety of distinction between probable cause and lack of probable cause in differing situations of warrantless arrests. For this reason we believe that the force of *John Bad Elk* has been diminished." (App. 6)

If the force of those cases has been *diminished* it is for this Court to say so. Further, the citizen who is deemed to know the law should be able to have some reliance on and regard for the law as this Court has stated it, and this Court having stated the law, this petitioner could not have the criminal animus to have breached the law for acting in accordance with what this Court has determined to be the law.

It may be that this Court wishes to change the law, though we hope not. If the fact of officialdom gives an untrammeled right of arrest, without recourse, the police state has begun. We submit that, presuming this petitioner to know the law as set down by this Court, obliterates any felonious intent. We submit that above and beyond felonious intent, the presence on the law books of these decisions (this sought to be reviewed by the Seventh Circuit and *Heliczer*) gives such a range of power to the law enforcing executive as to threaten the security of a free people and leave them abandoned to the whim of the policing power. We consider this latter much more fundamental than the decisions of lower courts that ignore the rulings of this Court, even though ignoring the rulings of this court, in determining unilaterally they are no longer binding, is of great concern.

## III.

We believe the above statement adequately sets forth our position that an element necessary to a criminal prosecution must be proved by testimonial evidence in open court, subject to cross examination and right of confrontation. The concept of trial by affidavit has met with a reactionary revulsion even in civil trials. But more important is the fact that the Seventh Circuit has demonstrated confusion in the assessment of what constitutes this essential element with the rules guarding the evaluation of an affidavit supporting the complaint submitted to a magistrate. The Seventh Circuit seems so bound up in the "probable cause" decisions of this Court, starting with the unknown informant in *Jones* [*Jones* v. *United States*, 352 U.S. 257] that it considers those standards applicable to trial guaranteed by the Sixth Amendment. Ap-

parently this Court should dictate in what circumstances it is appropriate to apply the rules of law it sets down. This Court should make clear that trial by affidavit in criminal cases cannot be tolerated.

## CONCLUSION

Wherefore, for the above and foregoing reasons, this petitioner prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit in this cause.

Respectfully submitted,

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